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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARCO ZALDIVAR, on Behalf of Himself
and Others Similarly Situated,

Plaintiff,

v.

T-MOBILE USA, INC.,

Defendant.

No.

C 07 - 1695

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL



07-CV-01695-CMP

Plaintiff Marco Zaldivar, by and through his attorneys, bring this action on behalf of himself and all other persons similarly situated in the United States based on knowledge, information and belief formed after an inquiry reasonable under the circumstances, except to those allegations which pertain to the named Plaintiff or to his attorneys (which are alleged on personal knowledge), and hereby allege as follows:

I. NATURE OF ACTION

1. Plaintiff Zaldivar is a current wireless telephone customer of the Defendant T-Mobile USA, Inc. ("T-Mobile").

2. Plaintiff seeks relief in this action individually, and as a class action on behalf of all current and former non-business T-Mobile wireless service subscribers within the United States who did not contract for text messaging value bundles and who have been improperly

CLASS ACTION COMPLAINT - 1
Case No.

ORIGINAL



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1 charged and paid text-messaging fees that they did not owe and did not solicit or initiate
2 ("Class").

3 3. Defendant publishes rate plans, which advertise a fixed monthly charge for voice
4 and data services. Defendant's rate plans specify what additional charges, if any, the customers
5 will incur if they exceed the allotted minutes or data amount under the selected rate plan.

6 4. With respect to text messaging charges, however, Defendant failed, and continues
7 to fail, to clearly and conspicuously disclose to customers that text messaging is an additional
8 mandatory service for which Plaintiff and the Class will incur separate and additional charges.

9 5. Defendant also fails to clearly and conspicuously disclose to Plaintiff and
10 members of the Class that, unlike cellular telephone calls, they cannot reasonably avoid being
11 charged for unwanted text messages by not opening or responding to text messages, turning off
12 their phones, or by shutting off the text-messaging function. Thus, once Plaintiff and members
13 of the Class enter into a contract with the Defendant, customers are exposed to unavoidable and
14 unlimited text messaging charges that, given the proliferation of unsolicited messages, can
15 become a material amount of additional charges on a monthly basis. Plaintiff and members of
16 the Class are unable to discontinue their wireless services without incurring an early termination
17 fee, usually in the amount of \$200.

18 6. T-Mobile's unfair and deceptive practices violate Washington's Consumer
19 Protection Act, are a breach of T-Mobile's contract with its subscribers, and has unjustly
20 enriched the Defendant. Plaintiff and the Class have been harmed by Defendant's charging and
21 collecting fees from Plaintiff and those similarly situated for Defendant's mandatory text
22 messaging service to which Plaintiff and Class members did not agree.

23 II. JURISDICTION AND VENUE

24 7. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C.
25 § 1332(d)(2), the Class Action Fairness Act of 2005, and has supplemental jurisdiction pursuant
26 to 28 U.S.C. § 1367.



8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) because the Defendant, T-Mobile, is headquartered and has its principle place of business in this District, a substantial number of the acts and practices complained of herein occurred in this District, agreements that are the subject of this Complaint were entered into in part in this District and Defendant has received substantial compensation as a result of its acts and practices in this District.

9. Unless permanently restrained and enjoined by this Court, the Defendant will continue to engage in the acts and practices alleged in this Complaint in this District.

III. PARTIES

10. Plaintiff Marco Zaldivar ("Zaldivar") is a resident of San Luis Obispo County, California. Plaintiff Zaldivar entered into a contract with Defendant for wireless services in approximately May or June of 2006.

11. Defendant T-Mobile USA, Inc. is the United States operating entity of T-Mobile International AG & Co., the mobile communications subsidiary of Deutsche Telekom AG & Co. K.G. T-Mobile USA, Inc.'s headquarters and principle place of business in the United States is in Bellevue, Washington, in the County of King, State of Washington. Defendant T-Mobile has almost 27 million wireless customers in the United States, of which approximately 84% are under contract with T-Mobile. Defendant's standardized marketing materials, conceptualized and drafted in Washington, are disseminated to subscribers, and consumers in general, from over 5,700 T-Mobile retail locations throughout the United States.

IV. STATEMENT OF FACTS

12. T-Mobile markets and sells wireless telephone service through standardized wireless service plans at various retail locations, online sales and over the telephone. Under each of the wireless service plans, subscribers are sold an allotment of minutes or airtime that they can use each month to make or receive phone calls. The number of airtime minutes allocated to each customer is set according to the particular plan to which the customer subscribes.

CLASS ACTION COMPLAINT - 3
Case No.

001993-11 203103 V1



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1 13. In addition to the standard voice function of a telephone, current cellular phones
2 can support many additional non-voice services such as short message service for text
3 messaging, e-mail, packet switching for access to the Internet, and multimedia messaging service
4 for sending and receiving photos and video.

5 14. Without clear and conspicuous disclosure, or an express agreement, Defendant's
6 service includes a mandatory text messaging function for all users, for which subscribers will
7 incur an additional per message charge. Defendant charges subscribers for both the receipt and
8 the sending of text messages. A T-Mobile subscriber is also charged for the receipt of a text
9 message even if the unwanted text message is never read.

10 15. Unlike cellular telephone calls, text messages cannot be rejected or dismissed by
11 the recipient. A T-Mobile subscriber cannot avoid text messaging charges by turning off his or
12 her cellular telephone. If a subscriber turns off his or her phone, the text message is then simply
13 queued until the subscriber turns his or her phone back on. At that point, T-Mobile delivers the
14 queued message and a subscriber is charged.

15 16. T-Mobile subscribers are unable to turn off the text-messaging function
16 completely. According to T-Mobile, the "text messaging feature on . . . [a subscriber's] account
17 is a mandatory feature and cannot be removed due to system requirements." On information and
18 belief, other major carriers such as Verizon Wireless, Sprint Nextel Corporation, AT&T Inc. and
19 Alltel Corporation, all allow their subscribers to turn off the text messaging function in its
20 entirety, to avoid incurring unwanted charges.

21 17. T-Mobile's marketing and sales materials do not clearly and conspicuously
22 disclose that subscribers will be charged extra fees for the mandatory text messaging function.
23 In marketing and sales material available in T-Mobile's stores, entitled "Pricing – All of our
24 services and costs, all in one place," T-Mobile lists the name and features of individual or
25 "family" (multi-line) wireless plans, including (a) the number of "whenever" minutes available,
26 (b) the number of weekend and night minutes available, (c) the number of minutes to the five



1 people identified by their subscriber as his or her "favorites," and (d) the monthly cost for the
2 plan.

3 18. T-Mobile's online sales and marketing materials similarly do not disclose that
4 subscribers will be charged extra fees for the mandatory text messaging function. The online
5 sales and marketing materials list the name and features of the individual or "family" (multi-line)
6 wireless plans, including (a) the number of "whenever" minutes available, (b) the number of
7 weekend and night minutes available, (c) the number of minutes to the five people identified by
8 that subscriber as his or her "favorites," and (d) the monthly cost for the plan.

9 19. Both T-Mobile's online and in-store sales and marketing materials describe
10 T-Mobile's text messaging function as a separate optional service with a separate charge. For
11 example, T-Mobile's in-store materials list as a possible addition to any individual plan, "a
12 domestic Messaging Value Bundle for as little as \$4.99/month."

13 20. T-Mobile fails to disclose or discloses in a deceptive manner that the text
14 messaging feature is a mandatory feature of T-Mobile's service that cannot be turned off, and for
15 which the subscriber will incur a charge (generally between \$0.10 - \$0.15) for every message
16 sent or received, even if the subscriber declines to purchase an additional messaging service plan.

17 21. Once a subscriber has entered into a contract with the Defendant, he or she has no
18 choice but to continue the receipt of text messages. The vast majority of wireless service plans
19 offered by Defendant require that customers enter into a two (2) year contract with the
20 Defendant. If a customer decides to terminate his or her contract with Defendant prior to the
21 expiration of the two (2) year period, subscribers are required, as a term and condition of the
22 contract, to pay an early termination fee of \$200 per telephone number, regardless of the reason
23 for which the customer is cancelling. Alternatively, a customer must continue paying for the
24 unwanted service until the expiration of the contract term - incurring unlimited charges for text
25 messages.
26



1 22. Defendant's wireless service agreements are distributed on a standard form
2 printed contract. Defendant's form contract was prepared by the Defendant and presented to
3 Plaintiff and Class members on a "take it or leave it" basis. No individual consumer or Class
4 member is able to separately negotiate or modify any term of the agreement with the Defendant.
5 Rather, subscribers may only adhere to the contract or reject it. Rather, subscribers may only
6 adhere to the proposed contract or reject it.

7 23. No true equality of bargaining power exists between the Defendant and any
8 individual consumer or Class member. This unequal bargaining power precludes any individual
9 from enjoying a meaningful opportunity to negotiate and choose the terms of the contract.

10 24. By its policies and practices, including its deceptive conduct alleged herein,
11 Defendant is cheating large numbers of customers out of individually small amounts of money.
12 In doing so, Defendant attempts to effectively eliminate redress for its illegal conduct by
13 inserting unconscionable terms into its boilerplate adhesion contracts, such as arbitration clauses
14 that purport to bar class actions entirely. Such terms, if enforced, frustrate Washington State's
15 policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to
16 justice and thereby injures Plaintiff Zaldivar and the public.

17 25. In or about June 2005, Plaintiff Zaldivar entered into a two year service
18 agreement with the Defendant. The agreement was for service on four wireless telephones, for
19 Plaintiff Zaldivar, his wife and his two children. Plaintiff Zaldivar's initial service contract
20 included a charge for text messaging; he was informed he could immediately cancel this charge
21 by calling T-Mobile. Plaintiff Zaldivar called T-Mobile in order to cancel any subscription for
22 text messaging. Plaintiff Zaldivar understood that by cancelling the initial text messaging
23 service, he would no longer be charged for the unwanted text messaging service on his
24 telephones.

25 26. At the time he agreed to wireless service with the Defendant, Plaintiff Zaldivar
26 was not aware that text messaging was a mandatory feature of his service with T-Mobile.



1 Plaintiff Zaldivar believed that text messaging was a separate service, which was not a part of
 2 Plaintiff's contract with Defendant. Had Plaintiff Zaldivar been fully informed that text
 3 messaging was a mandatory provision of the contract with T-Mobile that could not be shut-off,
 4 Plaintiff Zaldivar would have acted differently in his purchasing decision.

5 27. In or around September 2007, Plaintiff Zaldivar received a bill from T-Mobile
 6 that included charges for text messages on his children's phones. On information and belief, a
 7 number of those charges were for unsolicited advertisements to which Plaintiff Zaldivar did not
 8 agree. Plaintiff has accordingly been charged, and has paid, fees for the receipt of unwanted text
 9 messages, and has been harmed thereby.

10 28. Plaintiff Zaldivar continues to be subject to unwanted text message charges,
 11 despite repeated requests to T-Mobile to disable the text messaging feature on his service.
 12 T-Mobile has refused to discontinue the text messaging service. Plaintiff Zaldivar is unable to
 13 cancel his contract with the Defendant without significant financial penalty, due to the early
 14 termination fees in T-Mobile's wireless service agreement.

15 29. Plaintiff is not the only T-Mobile customer to be surprised by charges for
 16 unwanted text messages. Set forth below is a sample of complaints found on the internet:

17 Posted By: JNOEL on 1/8/2006

18 Location: Lapeer, MI

19 I was charged sometimes \$9 & \$10 per text messages for messages
 20 I did not want or even read. I downloaded a ringer from T-Mobile
 21 and the the company that created the ringer has a deal with
 T-Mobile where they can send me text messages, charge T-Mobile
 and then T-Mobile charges me.

22 For almost 6 months I have been asking T-Mobile to help me stop
 23 the text messages. I was told that they we[re] unaware of who the
 24 company was and that they could not de-activate my text
 25 messaging feature. So whether I read the messages or not I was
 26 being charged for every one. I finally got the number to this
 company called m-Qube and they confirmed that they have an
 agreement with T-Mobile and T-Mobile is their biggest customer.
 T-Mobile regulates and gives them authorization to send the
 messages. I have been lied to and taken advantage of for months



1 now and I want to cancel my service. I should be to cancel without
 2 incurring a cancellation fee. I will not conduct business with a
 company I cannot trust.

3 <http://www.my3cents.com/showReview.cgi?id=11921>

4 30. Other complaints found on the internet state:

5 This is particularly bad for T-Mobile customers. T-Mobile
 6 frequently sends "company alert" text messages to all its
 customers. And unlike most other services, T-Mobile will refuse
 to cancel text messaging on your account.

7 "T-Mobile keeps billing me for incoming text messages," William
 8 of Mt. Morris, Mich. wrote. "I have no control over these and
 shouldn't be billed for them. One message was from a third party
 9 selling something. Another was from T-Mobile. I called, but they
 won't take the charges off. Furthermore, they refused to block text
 10 messaging on my account."

11 The great majority of ConsumerAffairs.Com complaints are from
 12 parents whose children decided to use text messaging or scour the
 Internet from their cell phone.

13 "We purchased a plan for our daughter who was entering college,"
 14 Charlene of Greenville, Miss. wrote. "When the first bill came it
 was for over \$600. The text messaging option is the main means
 of communication for my daughter. We had been charged for each
 15 incoming and outgoing text message - 10 cents per message."

16 Belkis of New York is a single mother with two children. In April
 17 her children browsed the Internet and downloaded a ringtone with
 her cell phone. Her bill was \$80 higher than normal that month.

18 Shelly Ng of Illinois, who says she was recently hit by text spam,
 19 was shocked when her seemingly simple request was rejected by a
 T-Mobile customer service representative.

20 "I asked them to turn off my texting capability because I don't text.
 21 They refused, claiming that their technology does not allow them
 to do so," Ng said.

22 Even worse, the agent then tried to sell her on a text message plan
 23 for \$4.95 per month. "I got so mad," she said.

24 Ultimately, T-Mobile gave her 15 free messages as a credit toward
 25 future spam. But the basic problem remains: Ultimately, Ng will
 again be charged 15 cents apiece for messages she doesn't want.



31. T-Mobile representatives admit that this practice occurs:

David Henderson, a T-Mobile spokesman, confirmed that T-Mobile users cannot turn off texting for technical reasons.

"The text messaging feature on your account is actually a mandatory feature and cannot be removed," he said. "This feature is needed because it's where voice mail and billing notifications are delivered."

Henderson said the problem of text spam is minimal because T-Mobile uses sophisticated spam software and allows consumers to add their own text filters on T-Mobile's Web site. The recent Fredericks spam, for example, didn't reach T-Mobile customers, he said. [Emphasis added.]

V. CLASS ACTION ALLEGATIONS

32. Pursuant to Rule 23(b)(1), (2) and 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiff Zaldivar brings this class action on his own behalf and as a representative of a Class of similarly situated consumers who were all subjected to Defendant's unlawful practices.

33. Plaintiff Zaldivar seeks to represent a Class of T-Mobile subscribers defined as:

All current and former non-business T-Mobile wireless service subscribers within the United States who did not contract for text messaging value bundles and who have been improperly charged and paid text messaging fees that they did not owe.

Excluded from the Class are Defendant, its employees, any entities in which Defendant has a controlling interest, its legal representatives, heirs, successors and assigns.

34. Numerosity of the Classes: The Class is composed of thousands of persons who subscribe to T-Mobile, the joinder of which in one action would be impracticable. The disposition of these claims through this class action will benefit the parties and the Court. The identities of individual members of the Class are ascertainable through Defendant's business records.

35. Existence and Predominance of Common Questions of Fact and Law: There is a well-defined community of interest in the questions of law and fact involved affecting the



1 members of the Class. The questions of law and fact common to the Class predominate over
2 questions affecting only individual Class members, and include, but are not limited to, the
3 following:

4 (a) the nature of Defendant's practices and policies concerning text
5 messaging;

6 (b) whether Defendant's practices concerning text messaging violate
7 Washington's consumer protection laws;

8 (c) whether Defendant's practices concerning text messaging are a breach of
9 contract with Plaintiff and Class members;

10 (d) whether Defendant has been unjustly enriched through its practices and
11 policies concerning text messages;

12 (e) whether Plaintiff and Class members are entitled to restitution of all
13 amounts acquired by Defendant resulting from its unlawful practices;

14 (f) whether Plaintiff and Class members are entitled to recover actual and/or
15 compensatory damages as a result of Defendant's unlawful practices; and

16 (g) whether Plaintiff and Class members are entitled to an award of
17 reasonable attorneys' fees, prejudgment interest, and costs of this suit.

18 36. Typicality: Having been a victim of Defendant's unlawful business practices,
19 Plaintiff is asserting claims typical of the Class he seeks to represent. Plaintiff and all members
20 of the Class, have similarly suffered harm arising from Defendant's violations of law, as alleged
21 herein.

22 37. Adequacy of Representation: Plaintiff is an adequate representative of the Class
23 because his interests do not conflict with the interests of the Class members he seeks to
24 represent. Plaintiff will fairly and adequately represent and protect the interests of the Class
25 because his interests are not antagonistic to that of the Class. Plaintiff has retained counsel who
26 are competent and experienced in prosecution of class action litigation.



1 38. Superiority: The class action is superior to other available means for the fair and
2 efficient adjudication of Plaintiff's and Class members' claims and no unusual difficulties are
3 likely to be encountered in the management of this class action. Plaintiff and the members of the
4 Class have suffered irreparable harm as a result of Defendant's unfair and unlawful conduct.
5 Because of the size of the individual Class members' claims, few, if any, Class members could
6 afford to seek legal redress for the wrongs complained of herein. Absent the class action, the
7 members of the Class will continue to suffer losses. Moreover, the violations of law described
8 herein will continue without remedy, and Defendant will be permitted to retain the proceeds of
9 its misdeeds. Defendant continues to deny wrongdoing and to engage in the unlawful and unfair
10 conduct as described in this Complaint.

11 39. This action is also properly certified under the provisions of Federal Rule of Civil
12 Procedure 23(b)(1), 23(b)(2), and/or 23(b)(3) because:

13 (a) The prosecution of separate actions by individual members of the Class
14 would create a risk of inconsistent or varying adjudications with respect to individual Class
15 members, thus establishing incompatible standards of conduct for Defendant's activities;

16 (b) Due to the nature of the relief sought, the prosecution of separate actions
17 by individual members of the Class would create a risk of adjudications with respect to them that
18 would, as a practical matter, be dispositive of the interests of the other members of the Class not
19 parties to such adjudications or would substantially impair or impede the ability of such members
20 of the Class to protect their interests; and

21 (c) By failing to make the written disclosures required by applicable laws or
22 by improperly charging Plaintiff and the Class fees for text messaging, Defendants have acted or
23 refused to act in respects generally applicable to the Class, thereby making appropriate final
24 injunctive relief with regard to the members of the Class as a whole in terms of the nature of the
25 relief sought.
26



COUNT I

BREACH OF CONTRACT

40. Plaintiff and the Class incorporate by reference the preceding paragraphs as if fully set forth herein.

41. Plaintiff and the members of the Class entered into a contract both express and implied with the Defendant. The Defendant offered to provide wireless phone service in consideration of payment for services from the Plaintiff and the Class. Under the terms of the agreement, Plaintiff and the members of the Class were required to pay in full the agreed-to charges submitted to them on their bills. Failure to pay in full would result in a breach of contract and discontinuance of wireless telephone service, accrued interest and a cancellation fee.

42. Plaintiff and the members of the Class accepted the offer of services from the Defendant and performed their portion of the contract.

43. The express and implied terms of the contract were that the Defendant would only charge the contractually agreed-upon charges.

44. Defendant has charged Plaintiff and members of the Class for text messaging to which the Plaintiff and members of the Class did not agree, in breach of their contract.

45. Plaintiff and the Class did not voluntarily pay these charges. Once a contract was agreed to between Plaintiff, the Class and the Defendant, Plaintiff and the Class had no means by which to prevent these charges. Each contract between the Defendant and Class members requires either a one or two year commitment by the Plaintiff or the Class member. Defendant's standardized contract imposes a \$200 termination fee for any consumer who terminates their service with Defendant prior to the expiration of the agreement, regardless of the reason.

46. The Defendant breached its contract with Plaintiff and Class members by improperly charging and collecting fees for text messaging, to which Plaintiff and the Class did not agree.



1 (h) Retaining money unlawfully collected from Plaintiff and the Class and
2 thereby defrauding Plaintiff and the Class.

3 51. Defendant intended for Plaintiff and the Class to rely on Defendant's advertising
4 and inducements and select its wireless service.

5 52. Defendant intended for Plaintiff and the Class to be deceived by Defendant's
6 failure to disclose that text messaging was a mandatory service for which Plaintiff and the Class
7 would incur a separate charge. Defendant also intended that Plaintiff and the Class would be
8 deceived and would promptly pay the wrongful charges.

9 53. Plaintiff and the Class in fact relied upon the Defendant's advertisements and
10 inducements and selected Defendant's wireless services. Plaintiff and the Class relied upon
11 Defendant's false and deceptive notices and billing statements and paid the unlawful charges to
12 Defendant.

13 54. Defendant is guilty of violating Washington's Consumer Protection Act, as the
14 unfair and deceptive acts or practices in the conduct of any trade or commerce and unlawful
15 under RCW 19.86.020.

16 55. As a direct and proximate result of the Defendant's false and deceptive
17 advertising, inducements, notices and billing statements, the Plaintiff and the members of the
18 Class were damaged.

19 56. The false and deceptive advertising, inducements, notices and billing statements
20 occurred in the course of business and commerce, as the Defendant is in the business of
21 providing wireless telephone services to Plaintiff and the members of the Class. The
22 Defendant's conduct is a part of a pattern or generalized course of conduct repeated on thousands
23 of occasions.

24 57. The above-described false and deceptive trade practices affect the public interest
25 and have the potential for continuation and repetition, adversely affecting the public interest
26 unless redressed.



COUNT III

UNJUST ENRICHMENT

58. Plaintiff and the Class incorporate by reference the preceding paragraphs as if fully set forth herein.

59. By charging Plaintiff and members of the Class fees based on text messages to which Plaintiff and members of the Class did not agree, and which Plaintiff and members of the Class could not avoid once they became subscribers on Defendant's network, Defendant is retaining money which, in justice and equity, belongs to Plaintiff and members of the Class.

60. Defendant has accordingly been unjustly enriched in these amounts, and must return them to Plaintiff and the Class.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of himself and on behalf of the Class, pray:

A. For an order certifying the Class, and appointing Plaintiff and their undersigned counsel of record to represent the Class;

B. For a permanent injunction enjoining Defendant, their partners, joint ventures, subsidiaries, agents, servants, and employees, and all persons acting under, in concert with them directly or indirectly, or in any manner, from in any way engaging in the unfair practices set forth herein;

C. For actual, compensatory damages and/or full restitution of all funds acquired from Defendant's unfair business practices;

D. For treble, exemplary and/or punitive damages up to the maximum amount permitted by law;

E. For the costs of suit herein;

F. For punitive damages, to be awarded to Plaintiff and each Class member;

G. For pre- and post-judgment interest on any amounts awarded;

H. For payment of reasonable attorneys' fees, expert fees; and



1 I. For such other and further equitable or legal relief, which the Court may deem
2 proper.

3 **DEMAND FOR JURY TRIAL**

4 Plaintiff hereby demands a trial by jury.

5 DATED: October 19, 2007

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7
8 By 

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